STATE OF ALASKA

Sean Parnell, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)269-5110

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VIA E-MAIL TO McLerran.Dennis@epamail.epa.gov & 1ST CLASS MAIL

Mr. Dennis McLerran
Regional Administrator
EPA Region X
RA 140
1200 Sixth Avenue
Seattle, Washington 98101
McLerran.Dennis@epamail.epa.gov

Re: State of Alaska's Concerns Regarding the Environmental Protection Agency's Evolving Bristol Bay Watershed Assessment and Potential Section 404(c) Action

Dear Mr. McLerran:

Thank you for your April 5, 2012 response to my March 9, 2012 letter regarding EPA's efforts on the Bristol Bay Watershed Assessment and potential Clean Water Act (CWA) Section 404(c) action. Frankly, I must confess disappointment that your April 5 letter reflects such little consideration by EPA of the significant issues raised by the State.

The only issue that EPA essentially addresses deals with what EPA perceives as its authority to conduct the assessment. Reiterating what is posted on its assessment website, EPA states that it is "performing" the assessment under CWA Section 104, and EPA quotes a portion of Section 104(a)(1). However, when read in context, the State believes that Section 104 does not justify EPA's expansive interpretation, which usurps and undermines the regulatory authorities of other state and federal agencies. Section 104(a)(1) states:

> The Administrator shall establish *national* programs for the prevention, reduction, and elimination of pollution and as part of such programs shall—

> (1) *in cooperation with other Federal, State, and local agencies,* conduct and promote the coordination and acceleration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction and elimination of pollution. (Emphases added.)

As I stated in my March 9 letter, the cited section pertains to the establishment of *national* programs, not site or region-specific endeavors that would dramatically impact the regulatory and property rights of individual states because – and I hope we can be candid with each other about this – the EPA's assessment is essentially directed at the Pebble Mine Project.

Moreover, the State's confusion about EPA's source of authority to conduct this assessment is not dispelled by your April 5 correspondence. In the EPA's Federal Register Notice, published February 24, 2012, requesting nominations of individuals for an external peer review panel to review the assessment, EPA cites Section 404 for its authority, not Section 104(a)(1). (http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/html/2012-4325.htm) Likewise, EPA does not cite any federal regulations to support the complex assessment process it is undertaking.

EPA's authority under the CWA is not plenary. *Mingo Logan Coal Company v. U.S. Environmental Protection Agency* (D.D.C. 2012), Case No. 10-0541 (ABJ). Land and water use management and environmental considerations are jointly shared across numerous state and federal agencies and environmental laws. Indeed, Congress expressly stated in the CWA that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).

Further, Senator Muskie, a prime sponsor of the CWA, recognized that a dredge and fill permitting regime already existed:

> Thus, the Conferees agreed that the Administrator ... should have a *veto* over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any *selected site*.
>
> *The decision is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed.* The Conferees expect the Administrator to be expeditious in his

> determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site. (Emphasis added.)

Senate Consideration of the Report of the Conference Committee, s. 2770, 93rd Cong. 1st Sess. Oct. 4, 1972, reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177.

The State finds itself in a "damned if you do, damned if you don't" situation. We are asked to cooperate in a process which, in our view, lacks authority and is inappropriate for the reasons set forth in my March 9 letter. If we do cooperate, we are "participating" in the process and our position is misrepresented. If we choose to ignore an assessment which is not lawfully grounded, it is argued we have forfeited our right to complain. It is unfortunate the EPA has chosen to equivocate on this threshold issue regarding the source of its authority for the action under consideration.

A representative from DNR will contact your office soon to coordinate a time to discuss the technical and related concerns the State presently has with EPA's assessment. It is also my hope that EPA will reconsider its position regarding legal authority for its current actions, halt the assessment, and adequately address the significant legal concerns expressed in my March 9 letter. If you would like a meeting to discuss those concerns, please contact me at (907) 269-3787.

Sincerely,

Michael C. Geraghty
Attorney General

Cc: Dan Sullivan, Commissioner, Dept. of Natural Resources, State of Alaska
Larry Hartig, Commissioner, Dept. of Environmental Conservation, State of Alaska